

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. POLLY)	
Claimant)	
VS.)	
)	
SEDGWICK COUNTY)	Docket No. 1,038,741
Self-Insured Respondent)	

ORDER

Respondent requested review of the October 15, 2008, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board (Board) heard oral argument on January 16, 2009.

James A. Cline, of Wichita, Kansas, appeared for the claimant. Timothy A. Emerson, of Wichita, Kansas, appeared for the self-insured respondent.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that claimant sustained a 16 percent whole person impairment as a result of his work-related accident on December 6, 2004. In so finding, the ALJ relied on the medical opinion of George G. Flutter, M.D., that claimant suffered an additional back injury and additional impairment to his low back over and above any preexisting impairment.

Respondent requests review of the ALJ's finding regarding the nature and extent of claimant's impairment. Specifically, respondent contends that claimant's back problems preexisted his work injury and that he suffered no new impairment in this work accident. Accordingly, respondent asks the Board to modify the Award and find that claimant is entitled to a scheduled injury of 9 percent, or at best 10 percent, to his left lower extremity.

Claimant asserts that he established by a preponderance of credible evidence that he sustained a general body disability as opposed to a scheduled injury. Claimant, therefore, requests that the Board affirm the Award of the ALJ.

FINDINGS OF FACT

Claimant was an employee of the Sedgwick County Sheriff's Department on December 6, 2004, when, as he was driving to work, he noticed a Wichita Police Department car with its lights on in a parking lot near Mount Vernon and Oliver Streets. Claimant was driving an unmarked patrol car. As claimant approached the area, the individual who had been stopped by the Wichita Police Officer took off running, heading toward claimant's unmarked patrol car. Claimant put his car into park and started to exit the vehicle. As he did so, a driver of a pickup in the area lost control of his vehicle, and the pickup struck claimant's vehicle. Claimant was pinned between his car door and the car frame. Claimant was taken by ambulance to the trauma unit at Wesley Medical Center emergency room where he was treated for injuries to his left leg, left knee, left forearm and lower back. Claimant was also ultimately diagnosed with a nasal fracture. There was a possibility of a proximal left fibular neck fracture, but that was not confirmed.

Claimant was dismissed from the emergency room that day, but returned on December 7, 2004, with chest wall pain. At that time, Dr. Steven Hughes noted significant swelling in claimant's left leg, a small hematoma over claimant's left forearm, and abrasions to claimant's lower lip and his nose. On December 10, claimant reported low back pain and advised the doctor that he was concerned about an aggravation of his previous low back surgery. Claimant's injury history is significant in that he underwent back surgery at L2-3 in 2002, under the care of surgeon Alan Moskowitz, M.D., for degenerative disc disease, with insertion of screws and a plate on the left side at that level. An MRI scan and CT scan of the lumbar spine done on September 15, 2005, indicated changes associated with the previous surgery, with no disc herniation or bony stenosis. A whole body bone scan on September 15, 2005, showed localized increased uptake at L2-3, consistent with the prior surgery. Claimant also underwent left ulnar nerve decompression in 2000.

Claimant continued with ongoing problems with his left knee. An MRI of the knee on April 5, 2005, showed a tear of the posterior cruciate ligament (PCL) with increased signal present. Dr. Daniel Prohaska performed arthroscopic surgery on May 6, 2005, including a reconstruction of the left knee PCL and chondroplasty of the femoral trochlea. Claimant was involved in a training exercise at work with respondent in November 2006, when he felt a pop and pain in the left knee. A second arthroscopy was performed by Dr. Prohaska and a loose body removed from the left knee. Claimant continued to experience difficulties with the knee, and a third surgery was performed by Dr. Prohaska

to release the peroneal nerve. This did not eliminate claimant's symptoms in the knee, but did prove somewhat beneficial.

Claimant was referred by respondent to board certified independent medical examiner John F. McMaster, M.D., for an examination on July 10, 2006. Dr. McMaster was provided a thorough history of claimant's injuries and resulting treatment. Claimant reported chronic pain in his left arm and elbow, low back and left knee. White sheet pain drawings prepared by claimant displayed pain in the left elbow, left ulnar distribution of the hand, low back, left knee and left anterior calf. Claimant was diagnosed with left posterior cruciate ligament tear; soft tissue injury to his left upper extremity; soft tissue injury to his left lower leg and ankle; and mechanical strain in claimant's low back. Claimant was rated at 7 percent to the left lower extremity (3 percent whole body) for the posterior cruciate ligament laxity and a 2 percent impairment to the lower extremity (1 percent whole body) for the left ankle/foot condition. Claimant's low back pain was described as a transient, self-limiting, mechanical low back strain, with no additional impairment from this accident. Claimant suffered no permanent impairment for the injuries to his left upper extremity. All ratings were provided pursuant to the fourth edition of the *AMA Guides*.¹

Claimant was referred by his attorney to board certified independent medical examiner George G. Fluter, M.D., for an examination on December 4, 2006. Dr. Fluter was also provided with a thorough medical history of claimant's injuries and post-accident treatment. A white sheet pain drawing completed by claimant displayed complaints at claimant's low back, left elbow, left knee and left calf. Claimant was diagnosed with internal derangement of the left knee, including the PLC tear, post surgery; left arm pain; left medial epicondylitis; and low back pain. Dr. Fluter rated claimant at 5 percent to the lumbar spine over and above any impairment resulting from the previous surgery, 2 percent to the left upper extremity (1 percent whole body) for the medial epicondylitis and 10 percent to the left lower extremity (4 percent whole body) for mild flexion contracture of the knee, all of which combined for a 16 percent whole body impairment. The ratings were all pursuant to the fourth edition of the *AMA Guides*.²

Claimant was referred by respondent to board certified independent medical examiner Chris Donald Fevurly, M.D., for an examination on June 6, 2008. Dr. Fevurly was also provided a thorough file on claimant and his injury history. Claimant provided a history of back pain after the surgery. Claimant modified his work duties somewhat, although this record fails to detail the extent of those modifications. Claimant displayed ongoing pain in his left knee with a feeling of instability and persistent numbness along the left lateral shin. There was a chronic ache in the left forearm with numbness and a burning-type pain in the ulnar nerve distribution. Claimant also had a sharp knife-like pain

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

² *AMA Guides* (4th ed.).

in his low back. Claimant's range of motion in his neck, elbows, wrists and hands was normal. There was diminished sensation in the left ulnar nerve distribution. Claimant was able to toe and heel walk, but was unsteady with a tandem walk. There was generalized tenderness throughout the lumbar spine, but range of motion was described as well preserved. Generalized tenderness was displayed throughout the left knee region, but there was no loss of range of motion in the knees and no laxity in the PCL. Of significance is Dr. Fevurly's finding that claimant tested negative in all five parameters of the Waddell's test.

Dr. Fevurly diagnosed claimant with low back pain which he considered to be the result of the 2002 surgery. The injuries suffered to claimant's low back from the 2004 accident were considered only a temporary exacerbation of that chronic low back pain. The ongoing left knee pain was determined to be at least partially related to chondromalacia, a natural consequence of living and aging, with no current evidence of posterior laxity from the PCL surgery. Claimant's left foot and ankle sprain had resolved without residual problems and his left forearm injury resolved without residual problems. The abrasion and laceration of claimant's lip and non-displaced nasal fracture all resolved. Claimant was rated at 5 percent to the left lower extremity for the degenerative chondromalacia changes, and 5 percent to the left lower extremity for the peroneal nerve injury, for a combined 10 percent to the left lower extremity. These ratings were pursuant to the fourth edition of the *AMA Guides*.³

At the time of the regular hearing, claimant continued to have pain in his lower back, left arm, left forearm, left knee and left leg. Claimant has returned to work for respondent, but his duties have been modified. Claimant continued to take 40 mg of OxyContin, three times per day, and Percocet 7.5, four times a day, for pain. These medications are prescribed by claimant's personal physician, Dr. Tracy Klein. Claimant testified that he was not on these medications prior to the accident.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.⁴

³ *AMA Guides* (4th ed.).

⁴ K.S.A. 44-501 and K.S.A. 2004 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.⁵

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.⁶

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁷

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁸

Claimant was involved in a serious work-related injury on December 6, 2004. As a result of that accident, claimant suffered injuries to his left leg, left arm, low back and face. The left knee injury, clearly the more serious, led to three different surgeries. No health care provider disputes that claimant suffered permanent injury for that injury. What is in dispute is the permanent involvement of the left upper extremity and low back. Here, claimant's complaints have been consistent. The white sheet pain drawings provided to both Dr. Fluter and Dr. McMaster were consistent in displaying left arm and low back pain. These complaints were also displayed at the time of the original injury. The Board finds claimant's consistency to be persuasive. Additionally, during the testing by Dr. Fevurly, respondent's hired expert, claimant tested negative with all five Waddell's parameters. This is an indication that claimant was not exaggerating his symptoms or magnifying the extent of his injuries. The Board is persuaded that claimant did suffer permanent injury to his left leg, left arm and low back from this accident. The determination by the ALJ that claimant suffered a 16 percent whole body functional disability, based on the opinion of Dr. Fluter, is affirmed.

⁵ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁶ K.S.A. 44-501(a).

⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁸ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

CONCLUSIONS

Having reviewed the entire evidentiary record contained herein, the Board finds that the Award of the ALJ should be affirmed. Claimant suffered injuries to his left lower extremity, left upper extremity and low back from the accident of December 6, 2004.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated October 15, 2008, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of April, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge